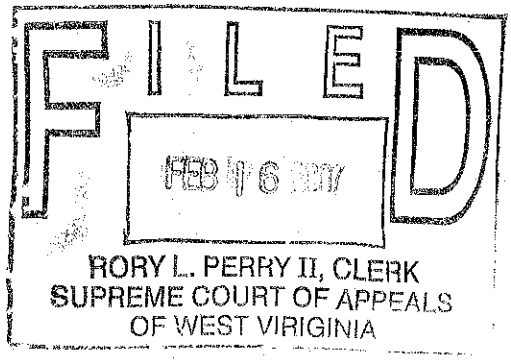
NO. 33198

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

ERIC DELBERT JETT,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal by Eric Delbert Jett (hereinafter "Appellant") from the December 2, 2005, Order of the Kanawha County Circuit Court (Walker, J.) which sentenced him to an indeterminate term of two to ten years in the penitentiary upon his conviction of operating or attempting to operate a clandestine drug lab under West Virginia Code § 60A-4-411 (2003).

On appeal, Appellant contends that the trial court committed error by refusing to include Appellant's proposed Instruction No. 1, which was the only instruction offered by Appellant, in the charge to the jury. Appellant's proposed Instruction No. 1 included the following language:

> If you find that the Defendant merely possessed or assembled chemicals or equipment or a combination thereof on or in any property, real or personal, for the purpose of manufacturing methamphetamine, you *must* find the Defendant not guilty.

(Emphasis added.) Appellant's proposed Instruction No.1 goes on to say:

> Likewise, the mere assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine does not constitute the crime of attempt to operate a clandestine drug laboratory.

Also, included in Appellant's proposed Instruction No. 1 is a definition of the crime of attempt wherein it provides:

> In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.

Appellant's proposed Instruction No. 1 concludes by stating:

> You are instructed that if you find the Defendant assembled chemicals or equipment or a combination thereof on or in property, real or personal, for the purpose of manufacturing methamphetamine, but that the Defendant committed no overt act in the manufacturing process itself, you must find the Defendant not guilty.

The trial court ruled that Appellant's proposed Instruction No. 1 was not a correct statement of the law and that the court's charge was a correct statement of the law and supported by the evidence. Accordingly, the court refused to give Appellant's proposed Instruction No. 1.

Appellant contends that because the court refused to give his proposed Instruction No. 1, this Court should reverse his conviction and remand his case for a new trial.

II.

STATEMENT OF THE FACTS

In June 2004, Appellant, along with his wife, Natasha Jett, and their son resided in their jointly owned home at 350 Elk River Road, North, Clendenin, West Virginia. (Tr. 361, 341; State's Ex. 22.) Appellant and Natasha Jett purchased their property located in Kanawha County, West Virginia, by deed, dated May 27, 2003, and recorded in the Office of the Clerk of the County

Commission of Kanawha County, West Virginia, in Deed Book No. 2579, page 304. (Tr. 327; State's Ex. 17.)

Appellant's home is a one-story structure under which there is a partial dug out cellar with a crawl space under the remainder of the house. The cellar is not accessible from inside the house. There is a carport beside the house. (Tr. 40; State's Ex. 20.) On the afternoon and evening of June 21, 2004, Appellant was at his home working on his car under the carport. His friend, Timothy Wycoff, was with him. (Tr. 363.) Between 5:30 and 6:00 p.m. Natasha Jett told Appellant that he needed to take Timothy home. (Tr. 364.) Before Appellant and Timothy left, a lock had been placed on the cellar door and Natasha Jett did not have a key. Natasha Jett did not hear from Appellant after he left or know where he had gone until she received a telephone call from Joey Wycoff on the evening of June 22, 2004, informing her that Appellant had been arrested. (Tr. 362.)

Mrs. Jett called her sister to come get her so she could stay with her for a few days. Mrs. Jett needed to go back to her home to get some clothes and to get her son's ventilator battery out of the cellar. Appellant's son was sick and required a ventilator. (Tr. 370.) Mrs. Jett's brother-in-law, Chris Teel, took her back to her home and he had to break the lock to get into the cellar in order to get the battery. (Tr. 370.) Mr. Teel observed what he perceived to be a clandestine Methamphetamine lab. (Tr. 381-82.) On the next day, June 23, 2004, Mr. Teel called Detective Mark Gilbert, a St. Albans police officer, who was assigned to the Metro Drug Enforcement Network Team (MDENT) to inquire if someone found a Meth lab in their house and reported it to the police, would he or she be held responsible in any way or would they be facing criminal charges. (Tr. 215.) The caller was anonymous to Detective Gilbert. Detective Gilbert advised the caller that he would need to investigate, but if someone was going to call and voluntarily turn over a Meth lab, that

person probably would not be charged. (Tr. 215.) Sometime later on that same day, Detective Gilbert received a second call from Chris Teel who advised him of a suspected Meth lab in the Clendenin area and asked if he could meet with him and a female, that Detective Gilbert could hear him asking questions. Detective Gilbert arranged to meet with Chris Teel and Natasha Jett at the old Kroger parking lot in the Clendenin area. (Tr. 216.)

On June 22, 2004, Detective Greg Nohe of the Marietta, Ohio, Police Department, who had been a member of the force for 18 years, received a call from a uniformed patrol officer of a potential shoplifting at a local supermarket in Marietta, Ohio. The patrol officer found two subjects who had shoplifted three packs of Dimetapp pills, which contain pseudoephedrine. The two individuals were Timothy Wycoff and his brother. He recognized there were indicators of a potential Methamphetamine problem, so he called Detective Nohe. Detective Nohe proceeded to the Food for Less Supermarket located at Sixth and Pike Street in Marietta where he found Appellant passed out in a vehicle in the store's parking lot. (Tr. 192.) A license plate check determined that the vehicle was owned by Appellant. (Tr. 193.) Appellant was passed out in the right front passenger seat and Detective Nohe walked around to the driver's side, entered the vehicle and attempted to arouse Appellant. He observed a marijuana pipe lying on the floor of the car and saw two bottles of liquid Heet lying on his lap. (Tr. 194.) Liquid Heet is a fuel additive used in the manufacture of Methamphetamine. (*Id.*) Detective Nohe observed a backpack lying on the backseat of the vehicle which he determined belonged to the Appellant and Timothy Wycoff. (Tr. 195.) Contained in the backpack were Red Devil lye, acetone, liquid fire, plastic tubing, coffee filters and some salt. All of these materials and substances are precursors for the manufacture of Methamphetamine. (Tr. 196.)

Detective Nohe read Appellant his Miranda rights. Appellant admitted to Detective Nohe that he used Meth the previous day on June 21, 2004; that he participated in 10 to 15 Meth cooks in Roane County, West Virginia, with a man named Bowen; that he attempted to cook Methamphetamine at his residence; that he owned part of the property in the backpack; and that he purchased the Red Devil lye which was in the backpack. (Tr. 198.) Appellant further admitted that he got his red phosphorus (matches) from the Go Mart located in Clendenin, West Virginia. Red phosphorus is located on the striker plates on matchbooks. (*Id.*) Appellant further admitted that he purchased the iodine liquid by the gallon and he got his Sudafed pills from the CVS store located in Clendenin, West Virginia. (Tr. 199.) Sudafed pills are the main ingredient for the manufacture of Methamphetamine. (*Id.*) There was plastic tubing located in the backpack (*see* State's Ex. 2) and a mason jar full of a liquid (State's Ex. 1). The liquid was in a multi-level form that is common to find in a mobile meth lab. (Tr. 201.) Tubing is used in the process of the manufacture of the Methamphetamine. (*Id.*) Appellant pled guilty in Ohio to possessing the chemicals to manufacture Methamphetamine. (Tr. 205.) Detective Nohe then called Detective Gilbert of MDENT and reported to him what had taken place on June 22, 2004, in Marietta, Ohio. (*Id.*)

MDENT is a multi-jurisdictional task force which was formed to investigate drug and narcotics trafficking offenses. (Tr. 209.) Detective Gilbert has been a part of the task force for five years and has received extensive training on high intensity drug trafficking areas and Methamphetamine identification. (Tr. 210.) Detective Gilbert has investigated over 100 Meth labs in Kanawha County. (Tr. 212.)

Detective Gilbert, having received the anonymous call from Chris Teel about a potential Meth lab in Clendenin and having knowledge of the arrest of Appellant in Marietta, Ohio, for

possessing chemicals to manufacture Methamphetamine, went along with Detective Taylor, a police officer employed by the city of Charleston, and Detective Green, a police officer employed by the city of Nitro, both of whom are also assigned to MDENT, to meet Chris Teel and Natasha Jett at the old Kroger's parking lot in Clendenin, West Virginia. The detectives followed Chris Teel and Natasha Jett to Mrs. Jett's residence at 350 Elk River Road, North, Clendenin, West Virginia. (Tr. 220.) Natasha Jett signed a consent to search form, giving the detectives permission to search her residence. (*See* State's Ex. No. 8; Tr. 221.) The detectives were advised that the suspected Methamphetamine lab was in the cellar of the residence. (Tr. 224.) When Detective Gilbert first opened the door of the cellar, a strong chemical odor was detected. (Tr. 225.) He described the odor as Methamphetamine. He had smelled it many times. (*Id.*) The detectives then proceeded to search the cellar. As a result of the search, the following items were seized:

1. one gallon can of E-Z acetone;
2. four empty 12 fluid ounce bottles of Heet (gasoline anti-freeze);
3. four pound boxes of Morton table salt;
4. two empty 16 fluid ounce bottles of Home Best brand hydrogen peroxide;
5. one empty gallon jug of Iodine Tincture 7%;
6. a blue cooler which contained one empty gallon jug of distilled water, a glass jar, which contained an unidentified liquid; and an empty glass jar;
7. coffee filters with dark chemical stains on them (believed to be iodine or red phosphorus stains);
8. numerous mason jars;
9. some tubing;
10. box of sandwich bags;

11. numerous matchboxes minus the striker plates (a source of red phosphorus);

12. 20-oz. Pepsi bottle with salt residue in the bottom; and

13. a blue trunk with a lock on it.

(*See* Tr. 226-28.)

The blue trunk was locked and Mrs. Jett gave the detective permission to search and determine what was located in the blue trunk. (Tr. 229.) The following items were seized from the trunk:

1. one gallon can of Coleman fuel;

2. eighteen-ounce bottle of Red Devil lye;

3. two propane tanks, typically used as a heat source;

4. small mason jar containing an unidentified chemical liquid;

5. large Gatorade bottle with a white powder substance on the inside (on sides and bottom believed to be salt);

6. two gallon jugs of distilled water;

7. paper towels;

8. dinner plate (used to dry the Methamphetamine on);

9. razor blades;

10. roll of duct tape;

11. one box of sandwich bags (150);

12. a can of Flavorite idolized [sic] salt; and

13. grayish colored solid material wrapped up in electrical tape (believed to be iodine crystals).

(*See* Tr. 230.)

The detectives found over 100 matchboxes with matches intact but the striker plates had been removed off of the back. The striker plates on back of matches contain red phosphorus, which is a key ingredient in the manufacturing of Methamphetamine. (Tr. 228.) They found coffee filters with dark chemical stains on them, which were believed to be iodine or red phosphorus stains. (*Id.*) All of the items that were seized are used in manufacturing Methamphetamine. (*Id.*)

The items found inside the trunk consisted of a dismantled Methamphetamine lab. (Tr. 229.) The dinner plate that was found was used to dry Methamphetamine. Rolls of duct tape were found which are used to seal off generators. A box of 150 sandwich bags were found in which the finished product is usually placed. Detective Gilbert described in his testimony how all of the items found would be used in the manufacture of Methamphetamine. (Tr. 231-42.) Detective Gilbert determined that the items that were seized at Appellant's residence indicated different stages in the production of Methamphetamine. (Tr. 243.) The detectives found odor ban to eliminate odor. It would be used in an attempt to mask the smell of the Methamphetamine production. (Tr. 246; State's Ex. 11.) Detective Gilbert testified that they have found no other possible reason to have Coleman fuel, ephedrine or pseudoephedrine pills mixed in a mason jar other than to manufacture Methamphetamine. (Tr. 256.) Detective Gilbert took several samples of the items seized from the cellar and sent it to the state lab for testing. Miss Stacy Taylor, a forensic drug analyst who works for the West Virginia State Police drug enforcement section, forensic laboratory, tested glass vials containing the substances that were forwarded to the lab by Detective Gilbert. In items one and six that she tested, the results indicated the presence of petroleum distillate, which is Coleman fuel lighter fluid. (Tr. 300.) Items two and seven indicated the presence of acetone. Item five indicated the presence the methanol. (Tr. 301.) That indicated to her that a tablet or a cold medicine of some

sort was crushed and dissolved in the methanol in order to obtain the pseudoephedrine hydrochloride which is an immediate precursor in the conversion into Methamphetamine. (*Id.*) Item eight indicated the presence of sodium hydroxide and item nine indicated the presence of iodine. (*Id.*) Miss Taylor explained how Methamphetamine is made. (Tr. 302-03.) Miss Taylor determined that these substances were necessary components of a clandestine drug laboratory and it appeared to her that initial steps had been taken to produce Methamphetamine. (Tr. 303.) Detective Jarl Taylor and Detective Clark Green, who assisted in carrying out the search of Appellant's cellar, confirmed that what was found in the cellar and seized was consistent with items for the production of Methamphetamine. (Tr. 321-24.)

Based on these facts, Appellant requested the court to give his Appellant's proposed Instruction No. 1.

The court refused because the instruction, in the court's opinion, did not correctly state the law and the instruction in her charge did correctly state the law and did conform with the evidence that had been presented.

III.

ASSIGNMENT OF ERROR

Appellant assigns the following error in the proceedings below:

1. The Trial Court Committed Reversible Error by Refusing to Give Defendant's Requested Instruction Defining Attempt, a Term of Art, Which was an Essential Element of the State's Case, Thereby Effectively Denying Jett Due Process of Law.

IV.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION NO 1.

1. Standard Of Review.

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo." Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). *See also State v. Dinger*, 218 W. Va. 225, 624 S.E.2d 572 (2005).

"When there is a question whether the facts are sufficient to justify the delivery of a particular instruction, the appellate court should review for abuse of discretion." 2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, II-83 (2d ed. 2006 Cumulative Supp.).

2. The Trial Court's Charge Correctly States The Law Of The Case And Is Supported By The Evidence.

The trial court's charge did correctly state the law of the case and the evidence adduced at the trial supports the giving of her charge. (Tr. 412.) The statute under which the Appellant was indicted, West Virginia Code § 60A-4-411, provides, in relevant part, as follows:

> (a) Any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony . . . (b) For purposes of this section, a "clandestine drug laboratory" means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine . . . ."

The court's charge, as relevant to defining the issues for the jury to decide and the elements of the crime with which the Appellant was charged, reads as follows:

SIXTH: THE ISSUES YOU ARE TO DECIDE IN THIS CASE

The defendant, ERIC DELBERT JETT, is charged in the indictment with the felony offense of operating or attempting to operate a clandestine drug laboratory.

One of two (2) verdicts may be returned by you as to this indictment. They are: 1) guilty of operating or attempting to operate a clandestine drug laboratory, or 2) not guilty.

The Court instructs the jury that any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony.

Further, the Court instructs the jury that a "clandestine drug laboratory" means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine.

Before ERIC DELBERT JETT, can be found guilty of the offense of operating or attempting to operate a clandestine drug laboratory as contained in the indictment in this case, the State must overcome his presumption of innocence and prove to your satisfaction beyond a reasonable doubt that:

1) ERIC DELBERT JETT,

2) In Kanawha County, West Virginia,

3) on or about the 23rd day of June, 2004,

4) did operate or attempt to operate

5) a clandestine drug laboratory

6) in which he did assemble

7) chemicals or equipment or a combination thereof

8) in or on any real or personal property

9) for the purpose of manufacturing methamphetamine.

If after impartially considering all the evidence in this case, each member of the jury is convinced beyond a reasonable doubt of each of these elements of operating or attempting to operate a clandestine drug laboratory, then you must find

> the defendant guilty of operating or attempting to operate a clandestine drug laboratory. If you have a reasonable doubt as to any one or more of these elements of operating or attempting to operate a clandestine drug laboratory, then you cannot return a verdict of guilty of operating or attempting to operate a clandestine drug laboratory, and you must find a verdict of not guilty.

(R. 252-53.)

The court, in the charge, first advised the jury of the issues that it was to decide in this case, and the possible verdicts that it could return. The two possible verdicts were guilty of operating or attempting to operate a clandestine drug laboratory or not guilty. The court then instructed the jury that any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony. The court then goes on to inform the jury what the definition of a clandestine drug laboratory is. Thereafter, the court, in its charge, instructed the jury that before Appellant can be found guilty of the offense of operating or attempting to operate a clandestine drug laboratory, as charged in the indictment, the State must overcome his presumption of innocence and prove to the jury's satisfaction, beyond a reasonable doubt, the elements of the crime, which were read to the jury. The court then charged the jury that, after impartially considering all the evidence in this case, if they were convinced beyond a reasonable doubt that each of the elements of operating or attempting to operate a clandestine drug laboratory were met, then the jury must find Appellant guilty of operating or attempting to operate a clandestine drug laboratory. However, the jury was charged that if they had a reasonable doubt as to any one or more of the elements of operating or attempting to operate a clandestine drug laboratory, then the jury could not return a verdict of guilty of operating or attempting to operate a clandestine drug laboratory and the jury must find a verdict of not guilty.

The court's charge correctly tracks the elements of the offense, as set forth in the statute. The court's charge plainly and clearly informs the jury that, in order to find the Appellant guilty, they

must be satisfied, after impartially considering all the evidence, that the State proved all the elements of operating or attempting to operate a clandestine drug laboratory beyond a reasonable doubt.

As a general proposition, the West Virginia Supreme Court has held that an instruction for statutory offense is sufficient if it adopts and follows the language of the statute or uses substantially the same language and it plainly informs the injury of the particular offense for which the defendant is charged. *State v. Banjoman*, 178 W. Va. 311, 359 S.E.2d 331 (1987); *State v. Slie*, 158 W. Va. 672, 213 S.E.2d 109 (1975).

The court was correct in concluding that her charge adopted and followed the language of the statute and used substantially the same language, and it plainly informed the jury of the particular offense for which the Appellant was charged and the elements that the State was required to prove beyond a reasonable doubt before they could convict the Appellant.

3. The Court Was Justified In Refusing To Give Appellant's Proposed Instruction No. 1.

It should be noted from the outset that Appellant only tendered one instruction for the court to consider for incorporation into its charge. During the course of Appellant's arguments to the court as to why the court should give Appellant's proposed Instruction No. 1, most of the discussion centered around Appellant's request to have the court instruct the jury that if they found that Appellant merely possessed or assembled the chemicals or equipment or a combination thereof, on or in any property, for the purpose of manufacturing Methamphetamine, then the jury must find the defendant not guilty. There was very little discussion over Appellant's request of the court to instruct the jury on the crime of attempt. In that regard, Appellant argued that the court needed to interpret whether or not merely assembling chemicals and ingredients creates a drug laboratory only

and there must be some further act in the manufacturing process to constitute an attempt of the actual operation of a drug laboratory. (Tr. 409, 410.)

The prosecution argued that the court should refuse Appellant's proposed Instruction No. 1 because it went way beyond the scope of the statute and the language within the instruction would do nothing but hamper and confuse the jury. (Tr. 410.)

The court, after giving due consideration to the arguments, ruled that Appellant's proposed Instruction No. 1 was not an accurate statement of the law, as she understood it, and therefore she refused to give the instruction. (Tr. 412.)

Appellant's proposed Instruction No. 1 reads as follows:

> The offense charged in this indictment is the operation or attempted operation of a clandestine drug laboratory. A "clandestine drug laboratory" means any property, real or personal, on or in which a person assembles *any* chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine.
>
> The State must prove beyond a reasonable doubt that the defendant operated or attempted to operate a clandestine drug laboratory. You are instructed that the mere assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine does not constitute the crime of operation of a clandestine drug laboratory. If you find that the Defendant merely possessed or assembled chemicals or equipment or a combination thereof on or in any property, real or personal, for the purpose of manufacturing methamphetamine, *you must find the Defendant not guilty.*
>
> Likewise, the mere assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine does not constitute the crime of attempt to operate a clandestine drug laboratory. In order to constitute the crime of attempt, two requirements must be met: (1) a specific *intent to commit the underlying substantive crime*: and (2) an *overt act toward the commission of that crime, which falls short of completing* the *underlying crime.*
>
> You are instructed that if you find the Defendant assembled chemicals or equipment or a combination thereof on or in any property, real or personal, for the purpose of manufacturing methamphetamine, *but that the Defendant committed no overt act in the manufacturing process itself, you must find the Defendant not guilty.*

(R. 370-71, emphasis added.)

It is clear that Appellant's proposed Instruction No. 1, when reviewed as a whole, is not a correct statement of the law.

The first paragraph of Appellant's proposed Instruction No. 1 is a correct statement of the law and is covered in the court's charge.

The first sentence of the second paragraph is also a correct statement of the law and is included in the court's charge.

The second sentence of the second paragraph of Appellant's proposed Instruction No. 1, which reads as follows: "You are instructed that the mere assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine does not constitute the crime of operation of a clandestine drug laboratory[,]" is not a correct statement of the law. First of all, the crime created in the statute is the operation of or attempt to operate a clandestine drug laboratory. This sentence completely ignores the second method of committing this crime, which is attempting to operate a clandestine drug laboratory.

The third sentence of the second paragraph of this instruction reads as follows: "If you find that the Defendant merely possessed or assembled chemicals or equipment or a combination thereof on or in any property, real or personal, for the purpose of manufacturing methamphetamine, you must find the Defendant not guilty."

The above sentence is not a correct statement of the law; it is abstract and does not relate to any of the facts adduced at trial. It is binding in that it directs the jury that they must find the Appellant not guilty and, more importantly, it directs the jury to find Appellant not guilty even though the State proved beyond a reasonable doubt that Appellant possessed or assembled chemicals

or equipment or a combination thereof on or in any property, real or personal, *for the purpose of manufacturing methamphetamine*. This instruction completely ignores all of the evidence that was presented, which showed that several stages of the process of manufacturing methamphetamine had taken place when examining the items that were seized from Appellant's cellar. There were four empty bottles of gasoline antifreeze, which is used in the manufacture of methamphetamine; two empty bottles of hydrogen peroxide; one empty jug of iodine tincture; an empty gallon jug of distilled water; coffee filters with dark chemical stains on them, believed to be iodine or red phosphorus stains, which are used in the process of manufacturing methamphetamine; some tubing; a box of sandwich bags; a 20-ounce Pepsi bottle with salt residue in the bottom; and approximately 100 matchboxes minus the striker plates, which were removed in order to produce red phosphorus, a necessary ingredient in the manufacture of methamphetamine. There was a blue trunk found in Appellant's cellar that essentially contained a dismantled clandestine drug laboratory, which included Coleman fuel; a bottle of Red Devil lye; two propane tanks; a large Gatorade bottle with a white powder substance on the sides and bottom; two gallon jugs of distilled water; paper towels; a dinner plate; a roll of duct tape; a box of sandwich bags; a can of Flavorite idolized salt; and a grayish colored solid material wrapped up in electrical tape, which was believed to be iodine crystals for use in a future methamphetamine cook. The court correctly concluded that the third sentence of the second paragraph of Appellant's proposed Instruction No. 1 did not correctly state the law and was not supported by the evidence.

The first sentence of the third paragraph of Appellant's proposed Instruction No. 1 reads as follows: "Likewise, the mere assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine does not constitute the crime of attempt to operate a clandestine

drug laboratory." This is not a correct statement of the law. Under the statute, the assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine by an individual could form the basis of the jury concluding that the individual was guilty of an attempt to operate a clandestine drug laboratory. When one goes out and accumulates the chemicals and/or equipment necessary to manufacture methamphetamine, he has taken an overt step toward that process and a jury could find that the individual had in fact attempted to operate a clandestine drug laboratory.

The second sentence of the third paragraph of Appellant's proposed Instruction No. 1 reads as follows: "In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime."

The above sentence is not a correct statement of the law, as it applies to this case. The cases cited by Appellant in support of this portion of Appellant's proposed Instruction No. 1 relate to the "crime of attempt," as set forth in West Virginia Code § 61-11-8. This statute, in relevant part, provides "[e]very person who attempts to commit an offense, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows."

The statute then provides the punishment for different crimes that an individual attempts to commit. In cases where the crime is an attempt to commit a crime, there is an underlying crime, as for instance, grand larceny and then attempt to commit grand larceny. In this instance, in order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime, which in this case would be grand larceny; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime, *i.e.* grand larceny.

In the case at bar, there is no underlying crime. The crime is operating or attempting to operate a clandestine drug laboratory. One who is involved in this type of conduct is guilty of a felony if he or she operates a clandestine drug laboratory or if he or she attempts to operate a clandestine drug laboratory. In either case, the penalty is the same. The jury can conclude that the accused operated a clandestine drug laboratory or attempted to do so or committed a combination of both and the verdict would still be guilty of the crime of operating or attempting to operate a clandestine drug laboratory. With this type of activity, it is hard to determine the distinct line between operating or attempting to operate a clandestine drug laboratory, and therefore the jury is given the option to convict an individual under either occurrence. Had the court given Appellant's proposed Instruction No. 1, the jury would have been trying to determine what the underlying substantive crime was, which would have completely confused them. The court was correct in denying the Appellant's request to give this definition; it did not correctly state the law as to this offense and it would have misled and confused the jury.

The final paragraph in Appellant's proposed Instruction No. 1 reads as follows:

> You are instructed that if you find the Defendant assembled chemicals or equipment or a combination thereof on or in any property, real or personal, for the purpose of manufacturing methamphetamine, but that the Defendant committed no overt act in the manufacturing process itself, you must find the Defendant not guilty.

Again, this is an abstract sentence that directs the jury that it must find the Appellant not guilty, which is not supported by the evidence and is not a correct statement of the law. Appellant wants the court to instruct the jury that, in order for him to be convicted of operating or attempting to operate a clandestine drug laboratory, the State has to prove beyond a reasonable doubt an overt act in the manufacturing process itself, meaning that the State must show that Appellant was actually

cooking methamphetamine even though it was not ultimately produced. That is not a correct statement of the law; one can be convicted upon circumstantial evidence of operating a clandestine drug laboratory without being caught in the act of cooking methamphetamine or being engaged in the actual manufacturing process. More importantly, however, this last sentence is not supported by the evidence in this case. Both Detective Gilbert and Ms. Stacy Taylor, the forensic drug analyst, testified that they found evidence from the items seized and tested that initial steps had been taken to produce methamphetamine. Moreover, Appellant admitted that he had used Meth two days prior to the search of his cellar; that he had participated in several Meth cooks in Roane County, West Virginia, and that he attempted to cook Meth at his residence.

> A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense. A defendant is only entitled to a jury instruction if the facts support the defense.

2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, II-88 (2d ed. 2006 Cumulative Supp.) (citations omitted).

> It is necessary that the instructions in each case be tailored to fit the evidence and issues of the particular case. *State v. Bennett*, 157 W. Va. 702, 203 S.E.2d 699 (1974); *State v. Thompson*, 21 W. Va. 741 (1883) . . . An instruction embodying an abstract proposition of law without in any way connecting it with the evidence or indicating any facts the jury must find from the evidence in order to make it applicable to the case ought not be given. Abstract instructions that are not tied to any facts of the case and are thereby confusing should properly be refused. *State v. Smith*, 358 S.E.2d 188 (W. Va. 1987). . . . Courts have cautioned the lower court in *State v. Ashcraft*, 309 S.E.2d 600 (W. Va. 1983), not to give abstract instructions which have the potential for confusing the jury.
>
> The West Virginia Supreme Court has consistently held that instructions given to the jury should contain clear, distinct and unambiguous statements of the law. An instruction calculated to mislead the jury, whether it arises from ambiguity

or from any other cause, ought to be avoided. *State v. Romine*, 272 S.E.2d 680 (W. Va. 1980); *State v. McClure*, 253 S.E.2d 555 (W. Va. 1979); *State v. Collins*, 154 W. Va. 771, 180 S.E.2d 54 (1971); *Black v. Campbell*, 6 W. Va. 51 (1871).

2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, II-226 (2d ed. 1993).

Instructions that are incomplete, misleading, incorrect or based upon insufficient evidence need not be given by the court. *State v. Plumley*, 184 W. Va. 536, 540, 401 S.E.2d 469, 473 (1990).

It also should be noted that the court's refusal to give Appellant's proposed Instruction No. 1 in no way impeded Appellant's closing argument or foreclosed the jury from passing on Appellant's basic theory that Appellant had not operated a clandestine methamphetamine lab or attempted to operate the same at his residence.

Accordingly, it is submitted that the lower court acted appropriately in refusing to give Appellant's proposed Instruction No. 1 on the grounds that the instruction was not a correct statement of the law; it was abstract in nature and binding on the jury; it was not supported by the evidence; and it would have confused and misled the jury in its deliberations in reaching a verdict in this case.

4. The Trial Court Did Not Commit Error By Refusing To Define The Word Attempt Because It Was Not A Word Of Art.

Appellant contends that the words "operate" and "attempt" are words of art and should have been defined by the trial court. Appellant quotes Franklin Cleckley in his *Handbook on West Virginia Criminal Procedure* in support of his contention that these words are of such uncommon usage and understanding that they should be instructed upon in order for the jury to properly understand the elements of the offense. Cleckley goes on to state the following: "An instruction

defining a term is sufficient if it follows verbatim the statutory definition." Cleckley, *supra*, at II-233 (citations omitted.)

In this case, there is no statutory definition of the words operate and attempt. Cleckley goes on to say that an "instruction couched in statutory language is sufficient as long as it plainly informs the jury of the law. . . . A term which is widely used and which is readily comprehensible to the average person without further definition or refinement need not have a defining instruction. Syl. pt. 2, *State v. Bartlett*, 355 S.E.2d 913 (W. Va. 1987)." Cleckley, *supra*, at II-234. The words operate and attempt fall within this latter category. The term attempt is extensively used in the criminal statutes of this state and is readily comprehensible to the average person without further definition or refinement. For example, many statutes in the West Virginia criminal code makes a crime of the commission of a certain act or the attempt to commit that act, and the Legislature in those cases has not elected to define the word attempt, even though in several cases, such as the statute at hand, the Legislature did find it necessary to define other terms.[2]

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[2]In West Virginia Code § 60A-4-411, the Legislature defined a clandestine methamphetamine lab, but did not deem it necessary to define the word "attempt." Accordingly, the court did not abuse its discretion in refusing to define these terms by electing to follow the statutory language enacted by the Legislature providing for the crime of operating or attempting to operate a clandestine methamphetamine lab. For example, West Virginia Code § 62-3-18 provides that on an indictment for felony, the jury may find the accused not guilty of the felony, but guilty of an attempt to commit such felony. Attempt is not defined. *See also* West Virginia Code § 61-2-12(b), "Any person who commits *or attempts to commit* robbery . . . " (emphasis added); West Virginia Code § 61-2-10, "If any person in the commission of, *or attempt to commit* a felony, unlawfully shoot, stab, cut or wound another person, . . ." (emphasis added); West Virginia Code § 61-5-4, "If any person shall bribe, by directly or indirectly giving to or bestowing upon, *or shall attempt to bribe* by directly or indirectly giving to or bestowing upon, . . ." (emphasis added); West Virginia Code § 61-3A-1. Shoplifting defined, "(b) A person who commits the offense of shoplifting if such person, alone or in concert with another person, knowingly and with intent obtains an exchange or refund *or attempts to obtain* an exchange or refund for merchandise . . ." (emphasis added); West Virginia Code § 61-3-5, "Any person who willfully and with intent to injure or defraud an insurer sets fire to or burns, *or attempts so to do*, . . ." (emphasis added); and West Virginia Code § 61-3E-7(b), "Notwithstanding the

V.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons the December 2, 2005, Order of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

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provisions of subsection (a) of this section, any person who possesses or uses a hoax bomb to commit *or attempt to commit* any felony shall be guilty of a felony . . . ." (emphasis added).

CERTIFICATE OF SERVICE

I, Ronald R. Brown, Assistant Attorney General for the State of West Virginia and counsel for Appellee, do hereby certify that a true and exact copy of the foregoing "Brief of Appellee State of West Virginia" was served upon counsel for Appellant by depositing the same, postage prepaid, in the United States mail, this 16th day of February, 2007, addressed as follows:

To: Crystal L. Walden, Esq.
Assistant Public Defender
Kanawha County Public Defender's Office
P.O. Box 2827
Charleston, WV 25330-2827

Dawn E. Warfield for
RONALD R. BROWN